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In the Supreme Court of the United States

October Term, 1962

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CITATION

Rule:

Rule 48, Federal Rules of Criminal Procedure 2, 7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 971

ROBERT A. WOODRING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 19–31; R. V, 1–13)[1] is reported at 311 F. 2d 417.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1963 (Pet. App. 32; R. V, 14). A petition for rehearing was denied on February 1, 1963 (R. V, 15). Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including April 2, 1963. The petition was filed on April 1, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] We will refer to the five-volume record by their Roman numerals, except that Volumes II and III, which contain the trial transcript, will be referred to as "Tr."

QUESTIONS PRESENTED

1. Whether the trial court's examination of defense witnesses and its comments during their testimony deprived petitioner of a fair trial.

2. Whether the court erred in dismissing one count of a seven-count indictment at the close of all the evidence on motion of the government, instead of directing a judgment of acquittal on this count.

RULE INVOLVED

Rule 48 of the Federal Rules of Criminal Procedure provides in pertinent part:

DISMISSAL

> (a) By Attorney for Government. The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.
>
> * * * * *

STATEMENT

Petitioner was tried in the United States District Court for the Eastern District of Missouri, on a seven-count indictment charging use of the mails and interstate wires in a scheme to defraud. The scheme alleged was that petitioner, as president of Youngstown Home Improvement Company, would induce persons to invest by falsely representing that he needed partners in a profitable company which had substantial inventory. At the close of the government's case petitioner's counsel moved for a directed verdict

of acquittal on all seven counts of the indictment, but the court reserved its ruling (Tr. 205). At the conclusion of all the evidence, count 6 was dismissed on motion of the government. Petitioner's counsel then moved the court to dismiss the other counts (1–5 and 7), and the court reserved its ruling (Tr. 388–389; R. IV, 2, 5, 15). The jury acquitted petitioner on counts 1, 2, 3, 5, and 7 and convicted him on count 4 (Tr. 390–391). The court ultimately refused to dismiss count 4 and petitioner was sentenced to imprisonment for three years (R. I, 28). On appeal, the conviction was affirmed.

Count 4, on which petitioner was convicted, rested on his dealings with Leonard Herman. Herman answered petitioner's advertisement of June 26, 1960,[2] which read as follows (Tr. 186, 197):

> Man who is honest and sincere and is seeking same with a Gentile partner: I have a very profitable and expanding business but need a partner to expand: $6,000 required; references.

After negotiations, on August 8, 1960, Herman and petitioner signed a contract which stated that Herman would purchase 50 shares of Youngstown from petitioner; that only 100 shares of Youngstown were outstanding; and that Youngstown would have $12,000 in assets upon closing the deal no later than August 10, 1960 (Tr. 188, 191, 351–352). On August 10 Her-

[2] The counts on which petitioner was acquitted related to persons who had made investments prior to Herman (Tr. 11, 43–44, 46, 84–85, 121–122, 125–126, 167, 171–172). Dissension arose between petitioner and the investors, and, by June 1960, some of them were pressing him for a return of their money. (Tr. 71, 93–94, 254–256, 262–263).

man gave petitioner his check for $6,000 and received a stock certificate for 50 shares (Tr. 191–192). The two men then went to the Lindell Trust Company and signed a card providing that their two signatures were necessary to make withdrawals from Youngstown's account (Tr. 192–193). On that date the balance in Youngstown's account was $6,504.69 (Tr. 193). Petitioner deposited Herman's $6,000 in petitioner's personal account (Tr. 352). According to petitioner's testimony, "within the hour, the same time," he withdrew $6,000 from the Youngstown account without Herman's signature, and on August 11, 1960, the account was overdrawn $206.73 (Tr. 193, 352–353). Petitioner testified that he took the $6,000 from the Youngstown account for sales commissions due him, but that this left the corporation with $12,000 in assets represented by equipment, signed contracts, and accounts receivable (Tr. 353). Petitioner also testified that at the time Herman came into the corporation, he (petitioner) was "about to lose everything" (Tr. 376, 378). Petitioner had only 23 shares of Youngstown after he had transferred 50 shares to Herman. Petitioner testified that he intended to purchase outstanding shares of other investors so that he and Herman would both own 50 percent, but no evidence of such attempts to purchase was introduced (Tr. 376–380).

On August 11, 1960, the day after petitioner obtained Herman's $6,000, petitioner telephoned Herman that upon the advice of his doctor he was taking a vacation (Tr. 194, 355–356, 385). During the next 40 or 45 days, Herman went to the corporation office

on four or five occasions but always found it closed (Tr. 195–196). Wekerle, one of the other investors, also testified that after August 10, 1960, he could not get into the office (Tr. 131).

ARGUMENT

1. The questioning by the court of defense witnesses Wicks (Tr. 209, 224–226, 232–233, 236–237), Mulligan (Tr. 248–249, 269), and petitioner (Tr. 317, 339–346, 371, 372–373) is set out verbatim at Pet. App. 34–45. We believe a reading of this portion of the record refutes petitioner's contention (Pet. 5–7) that he was deprived of a fair and impartial trial by reason of the zeal of the trial court. Indeed, petitioner's counsel himself implicitly recognized that the trial court's actions were proper by failing to object, except on one relatively unimportant occasion, to the court's questions and comments.

It is true that the court of appeals did criticize the district court's "injudicious statements and vigorous cross-examination" (Pet. App. 23). We doubt, however, whether this criticism was justified. As to witness Wicks, an architect for Youngstown, the court brought out that the incidents which the witness had difficulty relating had not occurred as long ago as the witness stated; that his memory was hazy as to the names of construction jobs and his part in making sketches for them; and that his valuation of the business at $100,000 was based solely upon what he had heard from petitioner (Pet. App. 34–37). As to the witness Mulligan, Youngstown's attorney, the court's questioning disclosed that the

witness erred in his testimony as to when he first represented petitioner and that Youngstown had held a shareholders', as distinguished from a directors', meeting (Pet. App. 37–39). The court could justifiably express surprise that an attorney answered incorrectly questions relating to matters reflected in documentary evidence (Pet. App. 38–39). The colloquies with petitioner merely exhorted him to answer the questions asked and to be certain of his testimony. They also disclosed that, in referring to his own and Youngstown's income tax returns, petitioner had made mistakes in reading parts of them. The court properly admonished petitioner not to misread documents which had been introduced in evidence (Pet. App. 42–44).

In any event, the court of appeals properly found that the judge's participation did not warrant reversal of the conviction (Pet. App. 24–29). In his charge, the judge specifically stated that the jury should not assume from the court's questioning of witnesses what the court's opinion was of the case; that, moreover, it was the sole responsibility of the jury to determine the credibility of the witnesses; and that the jury may disregard any of the court's comments in making its findings (R. IV, 4–5).[3] The

[3] The charge included the following (R. IV, 5): "During the course of the trial I occasionally ask questions of a witness in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions relate. Remember that at all times that you as jurors are at liberty to disregard all comments of the court in arriving at your finding as to the facts.

"If in the course of these instructions, and if during the trial, I have said anything that indicates to you how the court might feel, or how you think the court feels with respect to

challenged remarks by the trial court—which were not directly related to count 4—obviously did not have a coercive effect since petitioner was acquitted on all the other counts, which related to investments by others occurring before that on which count 4 rests. Thus, the jury plainly followed the court's instructions and itself weighed the credibility of the various witnesses.

2. The trial court did not err in dismissing count 6 of the indictment at the close of all the evidence, rather than, as petitioner now argues, directing a judgment of acquittal on this count. After count 6 was dismissed, petitioner himself moved "that the court dismiss" the other counts (Tr. 388–389). It is thus evident that petitioner was completely satisfied with dismissal of count 6, and tacitly gave his consent as Rule 48 of the Federal Rules of Criminal Procedure (*supra*, p. 2) requires.

Furthermore, even if petitioner had not consented to the government's dismissal, his contention is without merit for two additional reasons. First, the reason for requiring consent to dismissal under Rule 48 is to retain the common-law rule that a *nolle prosequi* with the consent of the defendant, as distinguished from an acquittal, would permit reindictment. The dismissal in this case, however, at the close of the

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the testimony in this case, and that opinion is different from your opinion of the testimony, you are to accept your opinion of the testimony rather than the court's, because it is your sole province to pass on the testimony, and from the testimony you pass on the credibility of the witnesses, and with that the court has nothing to do, just as you, as members of the jury, have nothing to do with determining what the law is in this case."

evidence, was obviously understood by all parties to be with prejudice and the government has no intention of reindicting or retrying the petitioner under count 6. Consequently, petitioner here has obtained the full protection which the consent requirement of Rule 48 was designed to provide. Second, if the government ever did attempt to retry petitioner on count 6, he could then argue both that the dismissal was with prejudice and that, since he has already been tried on this count and it was dismissed without his consent, retrial would constitute double jeopardy. He cannot now seek review of this issue when he has not been harmed.[4]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1963.

[4] Petitioner argues (Pet. 8) that, whereas counts 1, 2, 3, 5, and 7, on which the jury acquitted petitioner, dealt with activities earlier than count 4 on which he was found guilty, count 6 concerned events one day later than those in count 4 and therefore the jury would have seriously considered an acquittal on count 6. But the mailing charged in count 6 was to the same person involved in count 5 whose investment in the company preceded the negotiations with Herman. In any event, it is sheer speculation to suggest that the jury would have considered a judgment of acquittal different than it considered the dismissal.

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